

(1976) 07 MAD CK 0012
In the Madras High Court
Case No : Second Appeal No. 1431 of 1973

Visalakshi Ammal

APPELLANT

Vs

Narayanaswami Naidu and Others

RESPONDENT

Date of Decision : 06-07-1976

Acts Referred:

Citation : AIR 1978 Mad 72

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Advocate : R.S. Venkatachari, for the Appellant; V. Venkataraman, for the Respondent

Final Decision : Partly Allowed

Judgement

V. Ramaswami, J.—The plaintiff's legal representative is the appellant. The suit was filed for recovery of possession of the suit property

which is said to measure an extent of one acre 98 cents. It is not in dispute that this property originally belonged to one Joseph De. Gonzaga who

will hereinafter be referred to as Joseph. The plaintiff purchased the property from one John De. Gonzaga, hereinafter referred to as John, who is

the son of Joseph, through a lady by name Roger under the sale deed dated 6-6-1962. The second defendant claimed title to the same property

under a sale deed dated 7-2-1959 executed by one Piere who is the son of Joseph through another lady, Arumaikannu. The third defendant is the

sister of the said Piere and the 4th defendant is a pre-deceased sister's son of the said Piere. Joseph, Roger and Arumaikannu are admittedly

French Citizens governed by the French Civil laws.

It was the case of the second defendant that Joseph was married to

Arumaikannu long prior to 1914, that they lived together as husband and wife, that Arumaikannu had seven children out of this marriage and Piere and the third defendant are the only person to survive Joseph. It was her further case that there was no factual marriage between Joseph and Roger and even if there was a marriage, it was not valid in law as second marriage was prohibited under the Code Civil.

2. It may be mentioned that the plaintiff's case was that there was no marriage between Joseph and Arumaikannu and it had not been proved as required by law and that there was a legal and valid marriage between Joseph and Roger. Therefore according to the plaintiff John, his vendor alone was the legal heir of Joseph and Piere if at all would only be an illegitimate child not entitled to any share. On the factual position, both the Courts below have held raising a legal presumption that there was a marriage between Joseph and Arumaikannu. Both the Courts below have also held that there was a factual marriage between Joseph and Roger as per law, but the marriage was not valid and, therefore, John, the vendor of the plaintiff should be deemed to be an illegitimate child. On these findings the Courts below dismissed the suit of the plaintiff holding that his vendor had no title to the property and, therefore, he could not have conveyed any title to the plaintiff. It is not necessary for me, though the learned counsel for the appellant strenuously contended otherwise, to consider whether the marriage between Joseph and Arumaikannu had been proved by legal evidence. I will take it as a finding of fact and proceed on the assumption that there was a marriage between Joseph and Arumaikannu some time prior to 1914 and Piere and the third defendant are the two children through Arumaikannu. On the said reasoning I would have to accept the finding that Joseph was also married to Roger, that is factually there was a marriage between Joseph and Roger. The question for consideration is whether the marriage between Joseph and Roger was valid even as a second marriage and whether John, the admitted son of Joseph through Roger, could claim any right in the suit properties.

3. Title V of the French Civil Code deals with marriages. Article 147 states that it is not lawful to enter into a second marriage before the first had been dissolved. Chapter III of Title V deals with caveats to marriages and by whom such caveats should be filed. But these provisions relate to

preventing a second marriage. The legal consequence of a factual second marriage and how a marriage could be annulled are to be found in

Chapter IV of Title V, Article 184 provides that a marriage contracted in violation of the provisions of Article 147 may be impugned by the parties

themselves, by all those interested and by the Public Prosecutor. Under Article 187, whenever according to Article 184 an action for declaration

of nullity may be brought by the interested parties, such an action cannot be brought by the collaterals or by children born of another marriage

while the parties to the marriage are alive. Article 188 provides that a husband or wife, whose rights have been violated by a second marriage, may

demand the nullity of such marriage during the lifetime of the person who had been previously married to him or her. In such an action it was open

to the parties to the second marriage to plead that the first marriage was null, (vide Article 189). If the action is to be brought by the Public

Prosecutor he could only demand the nullity of marriage while the parties are still living and he must request the Court to order them to separate.

The consequences of declaring a marriage null are contained in Arts. 201 and 202 which read as follows:

201. A marriage which has been declared null has, if contracted in good faith, the civil consequences of a marriage so far as the parties thereto are concerned and the children.

202. If only one of the parties to the marriage has acted in good faith, the legal consequences of marriage only come into existence in favour of

such person and the children born of the marriage." It may be seen from these provisions that if a husband or wife whose rights have been violated

by the second marriage, wants to get the second marriage declared null, he or she could do it only during the lifetime of the person who had been

previously married to him or to her. In this case, if Arimaikannu the first wife wanted to get the second marriage with Roger declared as null, she

could have taken proceedings for such a declaration only during the lifetime of Joseph. She could not get the marriage declared null and void after

Joseph's death. Similarly, if the Public Prosecutor is to file an application for declaring the marriage void, he could do so only during the lifetime of

Joseph and Roger and not after the death of any one of them. We find a note on the French Civil Code by Blackwood Wright which is the

publication which is followed in this Court, to Article 201 and Article 202 which is to the following effect:

(d) These two latter sections are most important to persons marrying French subjects for it has been held under them that where either or both the

parties acted in ignorance of law and in good faith, the marriage, though it may be annulled by the Court, still makes the children born before the

annulment legitimate, and the parties who believed they were acting lawfully have the civil rights of married persons. Until a Court has pronounced

a marriage null, though the forms required by French law have not been complied with the marriage is good. The word "null" throughout this

chapter means "voidable" or "annullable by law". Thus, a Mexican woman who had gone through a religious ceremony of marriage with a

Frenchman in good faith in Mexico without having been married before the civil status officer, as required by Mexican law, was (as Courts of

French held she had acted in good faith) given the civil rights of a wife and her Children declared legitimate (sirey (1883) II 137). So a Non-

French subject who has married a Frenchman outside France who was under twenty five years of age without his having obtained the previous

consent of his parents was declared to have the civil rights of a wife and her children declared legitimate. (Table de Jurisprudence, 1791-1850,

Sub-tit. "Marriage," 437). The curious thing about this theory is that both the parties are entitled to marry again, though the innocent party has such

rights, and the children born or conceived before the decree of nullity are legitimate. A woman, for example, who has gone through a ceremony of

marriage with a man who is already married has a right to support as if she were a lawful wife until she marries again, when such right ceases,

(sirey, (1887), II, 235). The principle applies equally to mistakes of law (See Table Decennale, 1851-1860, Sub-tit. "Marriage," 74; Table

Decennale 1871-1880, sub-tit. Marriage, "53,54 sirey (1900) II, 131). The nature and the seriousness of the error do not effect this principle, but

are only facts which the Court must consider in determining whether there was good faith, (sirey, (1902), I. 225). The difference between the

English Law, which requires certain statutory conditions to be complied with, in default of which there is no marriage, is very marked. By English

law a marriage is only voidable for want of consent, or impotence, as distinct from, sterility".

There is no evidence to prove lack of good faith on the part of Joseph or Roger when they contracted the second marriage. Therefore, even if the marriage had been annulled the children born before the annulment are to be treated as legitimate children and not illegitimate. If the court had not pronounced the marriage null, though the marriage was contrary to Article 147, the marriage was good as the law provided only for a voidance of the marriage by the parties interested and had not declared the marriage itself as void ab initio.

4. In Amos and Walteon's Introduction to French Law, Second Edition, by Lawson, we find the following passage at page 65 which is to the same effect:

The nullity of a null marriage must be declared by judgment, Neither the parties nor strangers are authorised, in default of such judgment, to assume the nullity to be established". It may also be mentioned that even the case of marriage by persons who have not attained the age of consent

is treated as a null marriage, but it could not be questioned after a lapse of six months from the attainment of that age or by the pregnancy of the

wife. Another provision contained in Article 146 requires the consent of the persons referred to in Articles 150 to 155 as essential for the marriage

and there could be no marriage where there is no consent. This want of consent by the father or mother or the ascendants, as the case may be, is

also considered to make a marriage a null marriage. But the marriage could not be questioned after some time as provided in the other Articles.

Thus under the Code Civil, marriages contracted in contravention of the provisions are not treated as void marriages and not taking effect ipso jure

but it will have to be declared by Courts on the ground of contravention as nullity. So long as there is no such declaration by judgment, neither the

parties nor strangers are authorised to assume the nullity to be established. In this case, the validity of the marriage could not be questioned, as

Joseph died on 15-10-1956 and Roger died on 14-9-1963. Even Arumaikannu, the first wife, could not have questioned the second marriage

after the death of Joseph. In fact, it appears, that she never questioned the marriage. On the other hand, she was describing John as the son of

Joseph through Roger and as her husband's second wife's son. The result of it is both Joseph and Piere are the legitimate children of Joseph.

5. Under the French Law, in the case of intestate succession, when the deceased leaves children whether of the same or of different marriages, the

children succeed equally without distinction of age or sex. That is provided under Article 745 which reads as follows :

Children or their descendants inherit the property of their father and mother, grandparents or other ancestors, without distinction of sex or right of

primogeniture, even if they are the issue of different marriages. They inherit equally or per capita when they are all related in the first degree to the

deceased and entitled in their own right; they succeed per stirpes when all OT some of them inherit by representation"".

The heirs of course, will have to be determined when the succession opens, The succession in this case opened on the death of Joseph on 15-10-

1956. On that date, John, the vendor of the plaintiff, Piere, the vendor of the second defendant, and third defendant alone were alive. They would

each be entitled to one-third share. Arumaikannu, the widow of Joseph who was alive was only entitled to a maintenance out of the income from

the property.

6. But since she is dead now, that question also does not arise. Thus John, the vendor of the plaintiff had one-third share in the suit properties

which he Could have legally conveyed under Exhibit A-11 dated 6-6-1962 to the plaintiff. Thus, though the plaintiff claimed the entirety of the suit

properties, he had established his title to a one-third of the suit properties. It is well settled that when the plaintiff claims a larger interest but was

able to establish a lesser interest, to the extent he was able to establish his interest, a decree could be granted. The plaintiff is accordingly, given a

preliminary decree for partition and separate possession of his one-third share in the suit properties, I may add that in the view that he will be a co-

owner of the suit property, the defendants will not be entitled to any improvements even if they had made any such improvements.

7. The second appeal is allowed in part to the extent indicated above. There will be no order as to costs. No leave.